

No. 4:09-CR-106-H

V.

## ORDER

<sup>1</sup>Defendant also pled guilty to knowingly using, carrying and possessing firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) (count three) and possession with intent to distribute cocaine, cocaine base, ecstasy and marijuana in violation of 21 U.S.C. § 841(a)(1) (count four).

been convicted of an offense "punishable by a term of imprisonment exceeding one year."


At the time defendant pled guilty, Fourth Circuit precedent foreclosed this argument. See United States v. Harp, 406 F.3d 242 (2005) (holding that the maximum aggravated sentence that could be imposed upon a defendant with the worst possible criminal history is used to determine whether a conviction is for a crime punishable by a prison term exceeding one year under North Carolina law), overruled by United States v. Simmons, No. 08-4475, slip. op. at 15-17 (4th Cir. Aug. 17, 2011) (en banc). In United States v. Simmons, 635 F.3d 140, 146-47 (2011), vacated & reh'g granted, No. 08-4475 (4th Cir. Mar. 18, 2011), a panel of the Fourth Circuit reaffirmed its decision in Harp, rejecting the argument that Carachuri had overruled Harp.

After defendant entered his guilty plea but before sentencing, the Fourth Circuit vacated the panel decision in Simmons and granted rehearing en banc. Simmons, No. 08-4475 (4th Cir. Mar. 18, 2011). On August 17, 2011, the Fourth Circuit issued an en banc decision overruling Harp. United States v. Simmons, No. 08-4475, slip. op. at 15-17 (4th Cir. Aug. 17, 2011) (en banc).

To assist the court in its decisional process, the court hereby directs the government to inform the court, on or before September 21, 2011, of its position as to the impact on this

case of the Fourth Circuit's recent en banc decision in Simmons. Defendant may provide a written response to the government's filing on or before September 28, 2011.

This 7th day of September 2011.

  
MALCOLM J. HOWARD  
Senior United States District Judge

At Greenville, NC  
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